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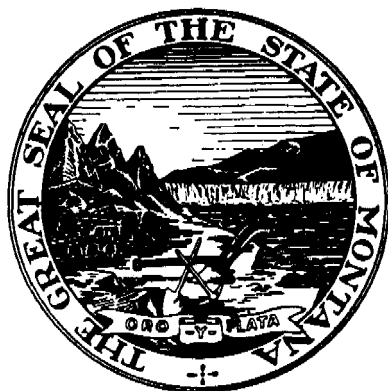
RESERVE

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OF MONTANA

MONTANA ADMINISTRATIVE REGISTER

1982 ISSUE NO. 19
OCTOBER 14, 1982
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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 19

The Montana Administrative Register (MAR), a twice-monthly publication, has three sections. The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing, and where written comments may be submitted. The rule section indicates that the proposed rule action is adopted and lists any changes made since the proposed stage. The interpretation section contains the attorney general's opinions and state declaratory rulings. Special notices and tables are inserted at the back of each register.

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STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF MEDICAL EXAMINERS

IN THE MATTER of the proposed)	NOTICE OF PROPOSED AMENDMENTS
amendments of ARM 8.28.1503)	OF ARM 8.28.1503 QUALIFICA-
concerning the qualifications)	TIONS OF PHYSICIAN'S ASSISTANT;
of physician's assistants; 8.)	8.28.1504 APPLICATION; and
28.1504 concerning applications)	8.28.1508 TEMPORARY APPROVAL
for physician's assistants; and)	
8.28.1508 concerning temporary)	NO PUBLIC HEARING CONTEMPLATED
approval of physician's assis-)	
tants.)	

TO: All Interested Persons:

1. On November 13, 1982, the Board of Medical Examiners proposes to amend the above stated rules.

2. The proposed amendment of 8.28.1503 will add a new subsection (1)(e) and will read as follows: (new matter underlined, deleted matter interlined)

"8.28.1503 QUALIFICATIONS OF PHYSICIAN'S ASSISTANT

(1) As evidence of possessing the qualifications required by statute, an applicant shall provide to the board:

(a)...

(e) must appear before the board for permanent certification and must have sponsoring physician appear with the physician assistant.

(2)..."

3. The board is proposing the amendment to allow the full board the opportunity to explain the limitations of the physician's assistant law to both sponsoring physician and physician assistant. The authority of the board to make the proposed change is based on section 37-20-201, MCA and implements section 37-20-101, MCA.

4. The proposed amendment of 8.28.1503 amends subsection (3)(b) and will read as follows: (new matter underlined, deleted matter interlined)

"8.28.1504 APPLICATION (1)...

(3) The application shall be accompanied by:

(a)...

(b) proof of insurability of the physician's assistant from liability for his errors, omissions, or actions.

A certified letter is acceptable stating the state physician assistant will be insured after the certification is received."

5. The board is proposing the amendment because insurance companies have taken the position that they will insure the physician's assistants after they have a license. The board had requested the insurance before issuance of the license. In order to get the physician's assistants working in Montana, the board agreed to the above change so that the physician's assistant could get insurance. The authority of the board

to make the proposed change is based on section 37-20-201, MCA and implements section 37-20-102, MCA.

6. The proposed amendment of 8.28.1508 will add a new subsection (5) and will read as follows: (new matter underlined)

"8.28.1508 TEMPORARY APPROVAL (1)...

(5) The physician's assistant must be interviewed by one board member for temporary approval."

7. The board is proposing the amendment to allow review of application by interviewing board member and to provide the physician's assistant the opportunity to respond directly to questions and to explain the precise limitations of the physician's assistant role. The authority of the board to make the proposed change is based on section 37-20-201, MCA and implements section 37-20-301, MCA.

8. Interested persons may submit their data, views or arguments concerning the proposed amendments in writing to the Board of Medical Examiners, 1424 9th Avenue, Helena, Montana 59620-0407, no later than November 11, 1982.

9. If a person who is directly affected by the proposed amendment wishes to express his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to the Board of Medical Examiners, 1424 9th Avenue, Helena, Montana 59620-0407, no later than November 11, 1982.

10. If the board receives requests for a public hearing on the proposed amendments from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed amendments; from the Administrative Code Committee of the legislature; from a governmental agency or subdivision; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register.

11. The authority and implementing sections are cited after each proposed amendment.

BOARD OF MEDICAL EXAMINERS
THOMAS J. MALEE, M.D., PRESIDENT

BY: 

GARY BUCHANAN, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, October 4, 1982.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF MEDICAL EXAMINERS

IN THE MATTER of the proposed) NOTICE OF AMENDMENTS OF ARM
amendments of ARM 8.28.414 con-) 8.28.414 TEMPORARY CERTIFICATES
cerning temporary certificates) and 8.28.420 FEE SCHEDULE
for physicians and 8.28.420)
concerning fees for physicians.) NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On November 13, 1982, the Board of Medical Examiners proposes to amend subsection (2) of 8.28.414 concerning temporary certificates for physicians and to amend 8.28.420 concerning fees for physicians.

2. The proposed amendment of 8.28.414 will amend subsection (2) and will read as follows: (new matter underlined, deleted matter interlined)

"8.28.414 TEMPORARY CERTIFICATE (1)...

(2) All temporary certificates must be reviewed and signed by two one members of the board and the applicant must be interviewed by one of the two board members. Temporary certificates are valid until the next board meeting, at which time the board may extend it for a year.

(3)..."

3. The board is proposing the amendment to place the rule in conformity with statutes (section 37-3-305 (2) (d), MCA) which requires the appearance of the applicant before only one member of the board. The authority of the board to make the proposed amendment is based on section 37-3-203 (1), MCA and implements section 37-3-305 (2) (d), MCA.

4. The proposed amendment of 8.28.420 will add a new subsection (e) and will read as follows: (new matter underlined)

"8.28.420 FEE SCHEDULE (1) The following fees will be charged:

(a)...

(e) Penalty fee

\$10.00"

5. The board is proposing the fee to prescribe the delinquency penalty as directed by section 37-3-313 (3), MCA. This fee is the same as prescribed statutorily prior to the 1981 legislative change which allows boards to set fees commensurate with costs. The authority of the board to make the proposed change is based on section 37-3-203 (1), MCA and implements section 37-3-313 (3), MCA.

6. Interested persons may submit their data, views or arguments concerning the proposed amendments in writing to the Board of Medical Examiners, 1424 9th Avenue, Helena, Montana 59620-0407, no later than November 11, 1982.

7. If a person who is directly affected by the proposed amendments wishes to express his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request, along with any written

comments he has to the Board of Medical Examiners, 1424 9th Avenue, Helena, Montana 59620-0407, no later than November 11, 1982.

8. If the board receives requests for a public hearing on the proposed amendments from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed amendments; from the Administrative Code Committee of the legislature; from a governmental agency or subdivision; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register.

9. The authority and implementing sections are cited after each proposed change.

BOARD OF MEDICAL EXAMINERS
THOMAS J. MALEE, M.D., PRESIDENT

BY: 

GARY BUCHANAN, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, October 4, 1982.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF NURSING

IN THE MATTER of the proposed) NOTICE OF PUBLIC HEARING ON
adoption of new rules relating) ADOPTION OF NEW RULES UNDER
to specialty areas of nursing) SUB-CHAPTER 3, SPECIALTY AREAS
OF NURSING

TO: All Interested Persons:

The notice of proposed adoption of new rules published in the Montana Administrative Register on August 26, 1982, at pages 1582 - 1585, issue number 16, is amended as follows because the required number of persons requested a public hearing.

The hearing was requested only on the above-stated adoption. The proposed amendment of 8.32.408 in the same notice is being amended as proposed in the rule section of this issue.

1. On November 12, 1982, at 10:00 a.m., a public hearing will be held in the conference room of the Department of Commerce, 1430 9th Avenue, Helena, Montana to consider the adoption of the rules Nurse-Midwifery Practice and Educational Requirements and other Qualifications Applicable to Specialty Areas of Nursing under Sub-Chapter 3, Specialty Areas of Nursing.

2. The text of the rules are stated in the Montana Administrative Register, issued number 16, published on August 26, 1982.

3. The rationale for the adoption is also stated in the above named register.

4. Interested persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to the Board of Nursing, 1424 9th Avenue, Helena, Montana 59620-0407, no later than November 11, 1982.

5. Geoffrey L. Brazier has been designated to preside over and conduct the hearing.

6. The authority of the board to make the proposed adoption is based on section 37-8-202 (2), MCA and implements sections 37-8-202 (5), MCA and 37-8-430, MCA.

BOARD OF NURSING
JANIE CROMWELL, R.N., PRESIDENT

BY: 
GARY BUCHANAN, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, October 4, 1982.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE HARD-ROCK MINING IMPACT BOARD

IN THE MATTER of the proposed) NOTICE OF PUBLIC HEARING ON
adoption of rules relating to) THE PROPOSED ADOPTION OF
proceedings before the Hard-) RULES GOVERNING PROCEEDINGS
Rock Mining Impact Board.) BEFORE THE HARD-ROCK MINING
IMPACT BOARD

TO: All Interested Persons:

1. On November 18, 1982, at 9:00 a.m., a public hearing will be held in the Department of Commerce Conference Room, 1430 9th Avenue, Helena, Montana to consider the adoption of rules pertaining to conduct of proceedings before the Hard-Rock Mining Impact Board.

2. The proposed rules read as follows:

"Organizational Rule

1. ORGANIZATION OF BOARD (1) The hard-rock mining impact board is created by section 2-15-1822, MCA, and appointed by the governor. By statute the board comprises five members, three of whom reside in an area impacted by large-scale mineral development. No more than three members may reside in the same congressional district.

The board consists of:

- (a) a representative of the hard-rock mining industry;
- (b) a representative of a major financial institution in Montana;
- (c) an elected school district trustee;
- (d) an elected county commissioner; and
- (e) a member of the public-at-large.

(2) Information or submissions: Inquiries regarding the board may be addressed to the Administrative Office, Hard-Rock Mining Impact Board, Department of Commerce, Capitol Station, Helena, Montana 59620-0401.

(3) Personnel roster

Mr. Koehler Stout, Chairman, Montana College of Mineral Science and Technology, West Park Street, Butte, Montana 59701 - Industry representative.

Mr. Jim Edwards, 2005 Washoe, Anaconda, Montana 59722 - County Commissioner.

Mr. Duane Friez, P. O. Box 811, Glendive, Montana 59330 - Representative of Financial Institution.

Mr. Leonard H. McKinney, Vice-Chairman, 312 13th Avenue North, Lewistown, Montana 59457 - Member of public-at-large.

Mr. James A. Tulley, P. O. Box 700, Big Timber, Montana 59011 - School District Trustee.

(4) For administrative purposes the board is attached to the department of commerce. For staffing purposes the board is attached to the department's economic and community development division. A chart of the department's organization is found at page 8-13 of these rules and by this reference is made a part of the board's organizational rules. (Auth. 2-4-201, MCA; Imp. 2-4-201, MCA)

Procedural Rules

II. PUBLIC PARTICIPATION (1) The hard-rock mining impact board hereby adopts and incorporates by reference ARM 8.2.101 through 8.2.207 which sets forth the department of commerce's public participation rules. A copy of the rules may be obtained from the Hard-Rock Mining Impact Board, 1424 9th Avenue, Helena, Montana 59620-0407. (Auth. 2-3-203, MCA; Imp. 2-3-103, MCA.)

III. GENERAL PROCEDURAL RULES (1) The hard-rock mining impact board hereby adopts and incorporates by reference ARM 1.3.101 through 1.3.234 which sets forth the attorney general's model procedural rules. A copy of the model rules may be obtained from the Hard-Rock Mining Impact Board, 1424 9th Avenue, Helena, Montana 59620-0407. The board will treat the hearing provided for by section 90-6-307 (4), MCA as a contested case hearing under the model rules. (Auth. 90-6-305, MCA; Imp. 90-6-307, MCA.)

IV. FORMAT OF PLAN (1) The format and substance of the plan shall allow for a ready review and analysis of the plan, its several parts, and their relationships to each other.

(2) The format of the plan shall contain the following elements:

(a) the name, address and phone number of the developer's contact person;

(b) a brief summary of the impact plan;

(c) a table of contents;

(d) numbered pages throughout;

(e) an index (to facilitate cross-referencing among current conditions, impact analysis, proposed mitigation measures, financing methods and timing, and so forth).

(3) The plan shall be bound in a manner that will allow for ready removal and insertion of pages. (Auth. 90-6-305, MCA; Imp. 90-6-307, MCA.)

V. NOTIFICATION AND SUBMISSION OF PLAN (1) A person (herein referred to as "the developer") required to prepare an impact plan by section 90-6-307 (1), MCA, shall notify the board and each affected county at least 90 days in advance of an anticipated submission of an impact plan.

(2) The developer shall submit 10 copies to the board and a sufficient number of copies to each affected county for distribution. (Auth. 90-6-305, MCA; Imp. 90-6-307, MCA.)

VI. PROOF OF SUBMISSION OF PLAN TO AFFECTED COUNTIES

(1) The board will accept as proof of the date of receipt of an impact plan by an affected county dated receipts, signed by an authorized representative of the county, confirming delivery of the plan by registered mail, hand delivery, or otherwise. (Auth. 90-6-305, MCA; Imp. 90-6-307, MCA.)

VII. COMPUTATION OF TIME (1) In computing any period of time prescribed by sections 90-6-301 through 90-6-310, MCA, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday or a holiday. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period. (Auth. 90-6-305, MCA; Imp. 90-6-307, MCA.)

VIII. CONTENTS OF OBJECTION TO PLAN (1) An objection to an impact plan submitted to the board shall contain or show:

- (a) the name(s) of the developer(s), the project and the impact plan;
- (b) the date the objection is submitted;
- (c) the name of the local government unit(s) raising the objection;
- (d) the government unit's contact person(s) (name, address, phone);
- (e) the name of the local government unit(s) affected by the objection;
- (f) the specific elements of the plan being objected to, giving page number(s);
- (g) the substance of the objection;
- (h) the reasons for the objection;
- (i) supportive data, information or analysis;
- (j) references to other related portions of the plan (giving page numbers), such as;
 - (i) analysis of employment and population;
 - (ii) analysis of location, nature, extent and cost of impact;
 - (iii) proposed mitigation measure;
 - (iv) proposed timing and cost of mitigation measure;
 - (v) proposed method, amount, and source of financing of the mitigation measure.
- (k) additional relevant information;
- (l) the objector's proposal for resolving the disputed issues;
- (m) a resolution dated and signed by the governing body of each objecting unit of local government confirming that the above statements appropriately reflect their views and concerns. (Auth. 90-6-305, MCA; Imp. 90-6-307, MCA.)

IX. SUBMISSION OF OBJECTIONS TO BOARD (1) At least 15 copies of the objection(s) shall be filed with the board and a copy filed with each affected local government

on the basis of local need; severity of impact from mineral development; the extent of local effort in meeting local needs; and the availability of grant funds. In receiving applications and awarding grants, the board will use the procedures outlined in the following rules. (Auth. 90-6-305, MCA; Imp. 90-6-305, MCA.)

XV. CONTENT OF GRANT APPLICATIONS (1) Following an inquiry by the applicant, the board will provide an application form requesting such information as is necessary to allow the board to verify the eligibility of the applicant, to evaluate the application and, if necessary, to establish priorities among eligible applications.

(2) Items to be included in the application will be the name of applicant; a description of the proposed project; a discussion of the need the project is intended to meet; how the specific project will meet that need; local priority for the project and how that priority was established; the relationship of the proposed project to a major hard-rock mineral development; the relationship of the proposed project to appropriate local plans; relevant budgetary information, including estimated cost of project and how it is to be financed initially and over time; a summary of current and projected revenues, revenue sources, expenditures, bonding capacity and indebtedness; and such additional information as the board may consider appropriate to the specific type of application.

(3) Information about the grant program and the requisite forms will be made available from the board's administrative office. (Auth. 90-6-305, MCA; Imp. 90-6-305, MCA.)

XVI. SUBMITTAL DEADLINES (1) Applications shall be submitted to the administrative office no less than 30 days prior to board consideration. Exceptions may be made at the board's discretion. (Auth. 90-6-305, MCA; Imp. 90-6-305, MCA.)

XVII. APPLICATION REVIEW PROCESS (1) The board will utilize an appropriate application process. (Auth. 90-6-305, MCA; Imp. 90-6-305, MCA.)

XVIII. CONTRACT WITH SUCCESSFUL APPLICANT (1) Upon the awarding of a grant, an appropriate contractual agreement will be executed between the hard-rock mining impact board and the local government unit. (Auth. 90-6-305, MCA; Imp. 90-6-305, MCA.)"

3. The Hard Rock Mining Impact Act of 1981 (sections 90-6-301 et seq, MCA) created the Hard Rock Mining Impact Board and authorizes or requires the board to carry out or oversee specific activities provided for by the Act. In addition, the board is required to adopt an organizational rule (section 2-4-201, MCA), rules governing public participation in the board proceedings (section 2-3-203, MCA), and rules of procedure

unit. (Auth. 90-6-305, MCA; Imp. 90-6-307, MCA.)

X. NOTIFICATION OF BOARD CONCERNING NEGOTIATIONS ON PLAN (1) By the end of the 30-day negotiating period described in section 90-6-307 (4), MCA, all affected parties shall notify the board in writing of the outcome of their negotiation efforts, clarifying which objections have been resolved and how and which objections still remain in contention. The developer shall provide the board with any mutually agreed upon amendments to the plan. The official copy of the amendments will bear the signatures of the developer's authorized representative, the chairman of the elected governing body of each affected unit of local government, and the chairman of the elected governing body of the county verifying the concurrence of their units of local government with the negotiated amendments. (Auth. 90-6-305, MCA; Imp. 90-6-307, MCA.)

XI. EX PARTE COMMUNICATIONS WITH BOARD MEMBERS

(1) No representative of any party to the plan may communicate with any board member outside the context of a public meeting on any issue related to the plan until the plan has received final approval.

(2) If requested to do so by any party to the plan, the staff of the board may be allowed to provide information during either the 90-day review period or the 30-day negotiation period as long as a written record of this communication is kept. (Auth. 90-6-305, MCA; Imp. 90-6-307, MCA.)

XII. IMPLEMENTATION OF APPROVED IMPACT PLAN (1) The hard-rock mining impact account may receive direct industry monies in compliance with the schedule specified in the approved impact plan. The board will distribute these monies to the appropriate affected local government units in accordance with law.

(2) The board will periodically notify the department of state lands of the mineral developer's compliance or non-compliance with the terms of the approved impact plan. (Auth. 90-6-305, MCA; Imp. 90-6-307, MCA.)

XIII. ADOPTION OF POLICIES OR GUIDELINES (1) From time to time, the board may adopt policies or guidelines relating to its internal operations, to the preparation or content of impact plans, or to the relationship between developers and local government units. These policies or guidelines, which will not have the force or effect of administrative rules, will be compiled and made available for public inspection at the board's administrative office. (Auth. 90-6-305, MCA; Imp. 90-6-307, MCA.)

Rules Governing Awarding of Grants

XIV. GENERAL PROVISIONS (1) In the event monies are made available to the hard-rock mining impact account for the purposes of grants to be made by the board, the board will receive and review applications and award grants

(section 2-4-201, MCA). The board proposes to adopt the foregoing rules to comply with these requirements and to establish the necessary procedures for the conduct of its functions and responsibilities. Of particular concern are those rules which would clarify the procedures for submitting and objecting to an impact plan, resolving objections and implementing the final plan. The board has also proposed rules governing the awarding of grants so that an administrative framework will be in place if the grant program should be funded from public or private sources. In proposing these rules the board is seeking to provide adequate guidance and commonality of interpretation to interested persons and thereby to facilitate implementation of the Act. At the same time, the board has sought to avoid inappropriate, unnecessary, or unnecessarily constrictive rules.

4. Interested persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Carol L. Ferguson, the Board's Administrative Officer, 1424 Ninth Avenue, Helena, Montana 59620-0407, no later than November 17, 1982.

5. Mr. Koehler Stout, Chairman of the board, will preside over and conduct the hearing.

6. The authority and implementing sections are listed after each proposed rule.

HARD-ROCK MINING IMPACT BOARD
KOEHLER STOUT, CHAIRMAN

BY: 

GARY BUCHANAN, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, October 4, 1982.

BEFORE THE DEPARTMENT OF REVENUE

OF THE STATE OF MONTANA

IN THE MATTER OF THE	)	NOTICE OF PUBLIC HEARING
Amendment of Rule 42.16.1112	)	on the Amendment of Rule
relating to away-from-home	)	42.16.1112 relating to
expenses.	)	away-from-home expenses.

TO: All Interested Persons:

1. On November 3, 1982, at 9:00, a. m., a public hearing will be held in the Fourth Floor Conference Room of the Mitchell Building, at Fifth and Roberts, Helena, Montana, to consider the amendment of rule 42.16.1112.

2. The proposed amendment modifies present Rule 42.16.1112 found in the Administrative Rules of Montana. The proposed amendment would clarify when nonresidents may deduct travel and away-from-home expenses from their Montana income.

3. The rule as proposed to be amended provides as follows:

42.16.1112 TRAVEL EXPENSES (1) In determining his Montana adjusted gross income, a nonresident temporarily working in Montana may deduct traveling expenses ~~allowed as deductions~~ in determining his federal adjusted gross income to the extent the expenses were incurred while temporarily away from his Montana tax home. Even though the taxpayer may be temporarily away from his home of residence in the course of his employment or in pursuit of a trade or business so as to have deductible traveling expenses for federal income tax purposes, the taxpayer will not be allowed a deduction for traveling expenses in determining Montana adjusted gross income except to the extent the deductible expenses were incurred while temporarily away from his Montana tax home.

(2) A nonresident, who during the course of business is required to travel into Montana, for a duration of 10 days or less each trip, may deduct a prorated share of the traveling expenses incurred while in Montana. The prorated share is that fractional part of the expenses incurred in Montana which the taxpayer's Montana adjusted gross income bears to his federal adjusted gross income.

This subsection shall be effective for tax years beginning after December 31, 1981.

~~(2)~~ (3) The term "Montana tax home" means the taxpayer's principal business location, post of duty, or station in Montana.

AUTH: 15-30-305, MCA; IMP: 15-30-131, MCA.

4. The Department is proposing this amendment to its rule because it is the result of a closing agreement entered into between the Department and a group of nonresident taxpayers.

During the course of negotiations the issue was raised as to the restrictions upon deducting away-from-home expenses by non-residents. As a part of the agreement, the Department agreed it would review its rule and propose a change. The existing rule 42-16-1112 addresses the nonresident taxpayer who comes to Montana and works in one location for an extended period of time, thereby establishing a Montana tax home. This rule, as it exists, does not address the nonresident taxpayer who, by the nature of his/her occupation, will be in and out of Montana several times throughout the year for periods of 10 days or less on each trip. The taxpayers in this category do not have an opportunity to establish a Montana tax home and, thus, under the existing rule cannot claim travel expenses incurred in earning the income that is subject to tax.

Therefore, the Department has changed subsection 2 to clarify when nonresidents may, and under what circumstances, deduct travel and away-from-home expense from their Montana income.

5. Interested persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to Ann Kenny, Legal Bureau, Department of Revenue, Mitchell Building, Helena, Montana 59620, no later than November 11, 1982.

6. David Slovak, Agency Legal Services, Department of Justice has been designated to preside over and conduct the hearing.

7. The authority of the agency to make the proposed amendment is based on 15-30-305, MCA, and the rule implements 15-30-131, MCA.



ELLEN FEAVER, Director

Certified to Secretary of State 10-4-82

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF the repeal of	)	NOTICE OF PUBLIC HEARING
rule 42.16.1116, the amendment	)	on the PROPOSED REPEAL
of rules 42.16.1115 and	)	OF RULE 42.16.1116, the
42.16.1117, and the adoption of	)	AMENDMENT OF RULES
rules I through XXIX, relating	)	42.16.1115 and 42.16.1117,
to the allocation and apportion-	)	and the ADOPTION OF RULES
ment of income by nonresident	)	I through XXIX
individuals of Montana)	

TO: All Interested Persons:

1. On November 3, 1982, at 1:00 p.m., a public hearing will be held in the Fourth Floor Conference Room, of the Mitchell Building, at Fifth and Roberts, Helena, Montana, to consider the repeal of rule 42.16.1116, the amendment of rules 42.16.1115 and 42.16.1117, and the adoption of NEW RULES I through XXIX, all of which relate to the allocation and apportionment of income by nonresident individuals of Montana.

2. The proposed new rules are intended as clarification of the present rules 42.16.1115 and 42.16.1117, and are intended to be a complete new Sub-Chapter within Chapter 16.

3. The rules as proposed to be repealed, amended and adopted provide as follows:

The rule proposed to be repealed can be found on page 42-1656 of the Administrative Rules of Montana.

42.16.1115 INCOME ATTRIBUTABLE TO MULTISTATE ACTIVITIES

(1) If a nonresident's income is derived from a business, trade, profession, or occupation carried on both within and without Montana, the income (or loss) reasonably attributable to that portion of the business, trade, profession, or occupation carried on in this state or to services rendered within this state is included in Montana adjusted gross income.

(2) The allocation and apportionment of such income or loss shall be made according to the provisions of ARM 42-16-1116 and 42.16.1117 and ARM 42.16.1201 through 42.16.1229.

AUTH: 15-30-305, MCA; IMP: 15-30-131, MCA.

42.16.1117 APPORTIONMENT OF MULTISTATE INCOME

(1) If the business, trade, profession, or occupation carried on within Montana is an integral part of a unitary business carried on within and without the state, the income attributable to Montana must be determined by apportioning the total income from the business, trade, profession, or occupation by the percentage derived from averaging the factors of sales, payroll, and property or such other factors as may be deemed necessary to fairly apportion the income.

(2) Apportionment of income shall be made according to the provisions of Article IV of the Multistate Tax Compact, 15-1-601, MCA and ARM 42.16.1201 through 42.26.1229.
AUTH: 15-30-305, MCA; IMP: 15-30-131, MCA.

RULE I INTENT (1) The following regulations are applicable to Articles II and IV of the Multistate Tax Compact, 15-1-601, MCA, and to 15-30-131(1), MCA. Statutory references in these regulations are to 15-30-131(1), MCA, but also apply to Articles II and IV of the Multistate Tax Compact, 15-1-601, MCA.

(2) These regulations are intended to set forth rules concerning the application of the apportionment and allocation provisions of Title 15, chapter 30, part 1, MCA, and Article IV of 15-1-601, MCA.

(3) The only exceptions to these allocation and apportionment rules contained in these regulations are set forth in ARM 42.16.1227 through 42.16.1230 pursuant to the authority of Article IV, Subsection (18), 15-1-601, MCA.

AUTH: 15-30-305, MCA; IMP: 15-30-131 and 15-1-601, MCA.

RULE II DEFINITIONS (1) "Allocation" refers to the assignment of nonbusiness income to a particular state.

(2) "Apportionment" refers to the division of business income between states by the use of a formula containing apportionment factors.

(3) "Business activity" refers to the transactions and activity occurring in the regular course of a particular trade or business of a taxpayer.

(4) "Taxpayer" means any corporation, partnership, firm, association, or person acting as a business entity in more than one state.

AUTH: 15-30-305, MCA; IMP: 15-30-131 and 15-1-601, MCA.

RULE III TWO OR MORE BUSINESSES OF A SINGLE TAXPAYER (1) A taxpayer may have more than one "trade or business." In such cases, it is necessary to determine the business income attributable to each separate trade or business. The income of each business is then apportioned by an apportionment formula which takes into consideration the instate and outstate factors which relate to the trade or business the income of which is being apportioned.

(2) The determination of whether the activities of the taxpayer constitute a single trade or business or more than one trade or business will turn on the facts in each case. In general, the activities of the taxpayer will be considered a single business if there is evidence to indicate that the segments under consideration are integrated with, dependent upon, or contribute to each other and the operations of the taxpayer as a whole. The following factors are considered to be good indicators of a single trade or business, and the presence of any of these factors creates a strong presumption that the activities of the taxpayer constitute a single trade or business:

(a) A taxpayer is generally engaged in a single trade or business when all of its activities are in the same general line.

(b) A taxpayer is almost always engaged in a single trade or business when its various divisions or segments are engaged in different steps in a large, vertically structured enterprise. For example, a taxpayer which explores for and mines copper ores; concentrates, smelts, and refines the copper ores; and fabricates the refined copper into consumer products is engaged in a single trade or business regardless of the fact that the various steps in the process are operated substantially independently of each other with only general supervision from the taxpayer's executive offices.

(c) A taxpayer which might otherwise be considered as engaged in more than one trade or business is properly considered as engaged in one trade or business when there is a strong central management, coupled with the existence of centralized departments for such functions as financing, advertising, research, or purchasing. Thus, some conglomerates may properly be considered as engaged in only one trade or business when the central executive officers are normally involved in the operations of various divisions and there are centralized offices which perform for the divisions the normal matters which a truly independent business would perform for itself, such as accounting, personnel, insurance, legal, purchasing, advertising, or financing.

AUTH: 15-30-305, MCA; IMP: 15-30-131 and 15-1-601, MCA.

RULE IV BUSINESS AND NONBUSINESS INCOME DEFINED (1) "Business income" is income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations. In essence, all income which arises from the conduct of trade or business operations of a taxpayer is business income. For purposes of administration, the income of the taxpayer is business income unless clearly classifiable as nonbusiness income.

(2) Nonbusiness income means all income other than business income.

(3) The classification of income by the labels occasionally used, such as manufacturing income, compensation for services, sales income, interest, dividends, rents, gains, operating income, nonoperating income, etc., is of no aid in determining whether income is business or nonbusiness income. Income of any type or class and from any source is business income if it arises from transactions and activity occurring in the regular course of a trade or business. Accordingly, the critical element in determining whether income is "business income" or "nonbusiness income" is the identification of the transactions and activity which are the elements of a particular trade or business. In general, all transactions and activities of the taxpayer which are dependent upon or contribute to the

operations of the taxpayer's economic enterprise as a whole constitute the taxpayer's trade or business and will be transactions and activity arising in the regular course of and will constitute integral parts of a trade or business. (See ARM 42.16.1205 for more specific examples of the classification of income as business or nonbusiness income; see ARM 42.16.1202 and 42.16.1203 for further explanation of what constitutes a trade or business.)

AUTH: 15-30-305, MCA; IMP: 15-30-131 and 15-1-601, MCA.

RULE V DETERMINATION OF BUSINESS AND NONBUSINESS INCOME The following are rules for determining whether particular income is business or nonbusiness income.

(1) Rental income from real and tangible property is business income if the property with respect to which the rental income was received is used in the taxpayer's trade or business or incidental thereto and therefore is includable in the property factor under ARM 42.16.1210, 42.16.1214 and 42.16.1215.

(2) Gain or loss from the sale, exchange, or other dispositions of real or tangible personal property constitutes business income if the property while owned by the taxpayer was used in the taxpayer's trade or business. However, if such property was utilized for the production of nonbusiness income or otherwise was removed from the property factor before its sale, exchange, or other disposition, the gain or loss will constitute nonbusiness income.

(3) Interest income is business income where the intangible, with respect to which the interest was received, arises out of or was created in the regular course of the taxpayer's trade or business operations.

(4) Dividends are business income where the stock with respect to which the dividends are received arises out of or was acquired in the regular course of the taxpayer's trade or business operations.

(5) Patent and copyright royalties are business income where the patent or copyright with respect to which the royalties were received arises out of or was created in the regular course of the taxpayer's trade or business operations or where the purpose for acquiring and holding the patent or copyright is related to or incidental to such trade or business operations.

AUTH: 15-30-305, MCA; IMP: 15-30-131 and 15-1-601, MCA.

RULE VI TAXABLE IN ANOTHER STATE (1) Under Article IV.(2) of 15-1-601, MCA, the taxpayer is subject to the allocation and apportionment provisions of Title 15, chapter 30, part 1, MCA, if it has income from business activity that is taxable both within and without this state. A taxpayer's income from business activity is taxable without this state if such taxpayer, by reason of such business activity (i.e., the transactions and activity occurring in the regular course of a particular trade or business), is taxable in another state.

(2) A taxpayer is taxable within another state if by reason of such business activity, another state has jurisdiction to

subject the taxpayer to a net income tax, regardless of whether or not the state imposes such a tax on the taxpayer.

(3) A taxpayer is not taxable in another state with respect to a particular trade or business merely because the taxpayer conducts activities in such other state pertaining to the production of nonbusiness income or business activities relating to a separate trade or business.

AUTH: 15-30-305, MCA; IMP: 15-30-131 and 15-1-601, MCA.

RULE VII APPORTIONMENT FORMULA (1) All business income of each trade or business of the taxpayer shall be apportioned to this state by use of the apportionment formula set forth in 15-1-601, MCA. The elements of the apportionment formula are the property factor (see ARM 42.16.1209), the payroll factor (see ARM 42.16.1216) and the sales factor (see ARM 42.16.1220) of the trade or business of the taxpayer.

AUTH: 15-30-305, MCA; IMP: 15-30-131 and 15-1-601, MCA.

RULE VIII PROPERTY FACTOR IN GENERAL (1) The property factor of the apportionment formula for each trade or business of the taxpayer shall include all real and tangible personal property owned or rented and used during the tax period in the regular course of such trade or business. The term "real and tangible personal property" includes land, buildings, machinery, stocks of goods, equipment, and other real and tangible personal property but does not include coin or currency.

(2) Property used in connection with the production of nonbusiness income shall be excluded from the property factor.

(3) Property used both in the regular course of taxpayer's trade or business and in the production of nonbusiness income shall be included in the factor only to the extent the property is used in the regular course of taxpayer's trade or business. The method of determining that portion of the value to be included in the factor shall reflect the average value of property includable in the factor. See ARM 42.16.1215.

AUTH: 15-30-305, MCA; IMP: 15-30-131 and 15-1-601, MCA.

RULE IX PROPERTY USED FOR THE PRODUCTION OF BUSINESS INCOME

(1) Property shall be included in the property factor if it is actually used or is available for use or capable of being used during the tax period in the regular course of the trade or business of the taxpayer. Property held as reserves or standby facilities or property held as a reserve source of materials shall be included in the factor. For example, a plant temporarily idle or raw material reserves not currently being processed are includable in the factor.

(2) Property or equipment under construction during the tax period (except inventoriable goods in process) shall be excluded from the factor until such property is actually used in the regular course of the trade or business of the taxpayer. If the property is partially used in the regular course of the trade or business of the taxpayer while under construction, the value of the property to the extent used shall be included in the property factor.

(3) Property used in the regular course of the trade or business of the taxpayer shall remain in the property factor until its permanent withdrawal is established by an identifiable event such as its conversion to the production of nonbusiness income, its sale, or the lapse of an extended period of time (normally 5 years) during which the property is held for sale.
AUTH: 15-30-305, MCA; IMP: 15-30-131 and 15-1-601, MCA.

RULE X CONSISTENCY IN REPORTING WITH RESPECT TO PROPERTY

(1) In filing returns with this state, if the taxpayer departs from or modifies the manner of valuing property or of excluding or including property in the property factor, used in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.

(2) If the returns or reports filed by the taxpayer with all states to which the taxpayer reports under Article IV of the Multistate Tax Compact or the Uniform Division of Income for Tax Purposes Act are not uniform in the valuation of property and in the exclusion or inclusion of property in the property factor, the taxpayer shall disclose in its return to this state the nature and extent of the variance.

AUTH: 15-30-305, MCA; IMP: 15-30-131 and 15-1-601, MCA.

RULE XI NUMERATOR OF PROPERTY FACTOR (1) The numerator of the property factor shall include the average value of the real and tangible personal property owned or rented by the taxpayer and used in this state during the tax period in the regular course of the trade or business of the taxpayer.

(2) Property in transit between locations of the taxpayer to which it belongs shall be considered to be at the destination for purposes of the property factor. Property in transit between a buyer and seller which is included by the taxpayer in the denominator of its property factor in accordance with its regular accounting practices shall be included in the numerator according to the state of destination.

(3) The value of mobile or movable property such as construction equipment, trucks or leased electronic equipment which are located within and without this state during the tax period shall be determined for purposes of the numerator of the factor on the basis of total time within the state during the tax period. An automobile assigned to a traveling employee shall be included in the numerator of the factor of the state to which the employee's compensation is assigned under the payroll factor or in the numerator of the state in which the automobile is licensed.

AUTH: 15-30-305, MCA; IMP: 15-30-131 and 15-1-601, MCA.

RULE XII VALUATION OF OWNED PROPERTY (1) Property owned by the taxpayer shall be valued at its original cost. As a general rule "original cost" is deemed to be the basis of the property for federal income tax purposes (prior to any federal adjustments) at the time of acquisition by the taxpayer and adjusted by subsequent capital additions or improvements thereto

and partial disposition thereof, by reason of sale, exchange, abandonment, etc.

(2) If the original cost of property is unascertainable, the property is included in the factor at its fair market value as of the date of acquisition by the taxpayer.

(3) Inventory of stock of goods shall be included in the factor in accordance with the valuation method used for federal income tax purposes.

(4) Property acquired by gift or inheritance shall be included in the factor at its basis for determining depreciation for federal income tax purposes.

AUTH: 15-30-305, MCA; IMP: 15-30-131 and 15-1-601, MCA.

RULE XIII VALUATION OF RENTED PROPERTY (1)(a) Property rented by the taxpayer is valued at 8 times its net annual rental rate. The net annual rental rate for any item of rented property is the annual rental rate paid by the taxpayer for such property less the aggregate annual subrental rates paid by subtenants of the taxpayer. (See ARM 42.16.1228 for special rules where the use of such net annual rental rate produces a negative or clearly inaccurate value or where property is used by the taxpayer at no charge or rented at a nominal rental rate).

(b) Subrents are not deducted when the subrents constitute business income because the property which produces the subrents is used in the regular course of a trade or business of the taxpayer when it is producing such income. Accordingly, there is no reduction in its value.

(2) "Annual rental rate" is the amount paid as rental for the property for a 12 month period (i.e., the amount of the annual rent). Where property is rented for less than a 12 month period, the rent paid for the actual period of rental shall constitute the "annual rental rate" for the tax period. However, where a taxpayer has rented property for a term of 12 or more months and the current tax period covers a period of less than 12 months (due, for example, to a reorganization or change of accounting period), the rent paid for the short period shall be annualized. If the rental term is for less than 12 months, the rent shall not be annualized beyond its term. Rent shall not be annualized because of the uncertain duration when the rental term is on a month-to-month basis.

(3)(a) "Annual rent" is the actual sum of money or other consideration payable, directly or indirectly, by the taxpayer or for its benefit for the use of the property and includes:

(i) any amount payable for the use of real or tangible personal property, or any part thereof, whether designated as a fixed sum of money or as a percentage of sales, profits, or otherwise;

(ii) any amount payable as additional rent or in lieu of rents, such as interest, taxes, insurance, repairs, or any other items which are required to be paid by the terms of the lease or other arrangement, not including amounts paid as service charges, such as utilities, janitor services, etc. If a payment includes rent and other charges unsegregated, the amount of rent

shall be determined by consideration of the relative values of the rent and the other items.

(b) "Annual rent" does not include incidental day-to-day expenses such as hotel or motel accommodations, daily rental of automobiles, etc.

(4) Leasehold improvements shall, for the purposes of the property factor, be treated as property owned by the taxpayer regardless of whether the taxpayer is entitled to remove the improvements or the improvements revert to the lessor upon expiration of the lease. Hence, the original cost of leasehold improvements shall be included in the factor.

AUTH: 15-30-305, MCA; IMP: 15-30-131 and 15-1-601, MCA.

RULE XIV AVERAGING PROPERTY VALUES (1) As a general rule, the average value of property owned by the taxpayer shall be determined by averaging the values at the beginning and ending of the tax period. However, the department may require or allow averaging by monthly values if such method of averaging is required to properly reflect the average value of the taxpayer's property for the tax period.

(2) Averaging by monthly values will generally be applied if substantial fluctuations in the values of the property exist during the tax period or where property is acquired after the beginning of the tax period or disposed of before the end of the tax period.

(3) Averaging with respect to rented property is achieved automatically by the method of determining the net annual rental rate of such property as set forth in ARM 42.16.1214.

AUTH: 15-30-305, MCA; IMP: 15-30-131 and 15-1-601, MCA.

RULE XV PAYROLL FACTOR IN GENERAL (1) The payroll factor of the apportionment formula for each trade or business of the taxpayer shall include the total amount paid by the taxpayer in the regular course of its trade or business for compensation during the tax period.

(2) The total amount "paid" to employees is determined upon the basis of the taxpayer's accounting method. If the taxpayer has adopted the accrual method of accounting, all compensation properly accrued shall be deemed to have been paid. Notwithstanding the taxpayer's method of accounting, at the election of the taxpayer, compensation paid to employees may be included in the payroll factor by use of the cash method if the taxpayer is required to report such compensation under such method for unemployment compensation purposes.

(3) The compensation of any employee on account of activities which are connected with the production of nonbusiness income shall be excluded from the factor.

(4) The term "compensation" means wages, salaries, commissions, and any other form of remuneration paid to employees for personal services. Payments made to an independent contractor or any other person not properly classifiable as an employee are excluded. Only amounts paid directly to employees are included in the payroll factor. Amounts considered paid directly include the value of board,

rent, housing, lodging, and other benefits or services furnished to employees by the taxpayer in return for personal services; provided, that such amounts constitute income to the recipient under federal Internal Revenue Code. In the case of employees not subject to the federal Internal Revenue Code, e.g. those employed in foreign countries, the determination of whether such benefits or services would constitute income to the employees shall be made as though such employees were subject to the federal Internal Revenue Code.

(5) The term "employee" means:

(a) any officer of the corporation or

(b) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. Generally, a person will be considered to be an employee if he is included by the taxpayer as an employee for purposes of the payroll taxes imposed by the Federal Insurance Contributions Act; except that, since certain individuals are included within the term "employees" in the Federal Insurance Contributions Act who would not be employees under the usual common law rules, it may be established that a person who is included as an employee for purposes of the Federal Insurance Contributions Act is not an employee for purposes of this rule.

AUTH: 15-30-305, MCA; IMP: 15-30-131 and 15-1-601, MCA.

RULE XVI CONSISTENCY IN REPORTING WITH RESPECT TO PAYROLL

(1) In filing returns with this state, if the taxpayer departs from or modifies the treatment of compensation paid used in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.

(2) If the returns or reports filed by the taxpayer with all states to which the taxpayer reports under Article IV of the Multistate Tax Compact or the Uniform Division of Income for Tax Purposes Act are not uniform in the treatment of compensation paid, the taxpayer shall disclose in its return to this state the nature and extent of the variance.

AUTH: 15-30-305, MCA; IMP: 15-30-131 and 15-1-601, MCA.

RULE XVII DENOMINATOR OF PAYROLL FACTOR (1) The

denominator of the payroll factor is the total compensation paid everywhere during the tax period. Accordingly the compensation paid to employees whose services are performed entirely in a state where the taxpayer is immune from taxation by example, by Public Law 86-272, are included in the denominator of the payroll factor.

AUTH: 15-30-305, MCA; IMP: 15-30-131 and 15-1-601, MCA.

RULE XVIII NUMERATOR OF PAYROLL FACTOR (1) The numerator

of the payroll factor is the total amount paid in this state during the tax period by the taxpayer for compensation. The tests in 15-1-601(14), MCA, to be applied in determining whether compensation is paid in this state are derived from the Model Unemployment Compensation Act. Accordingly, if compensation

paid to employees is included in the payroll factor by use of the cash method of accounting or if the taxpayer is required to report such compensation under such method for unemployment compensation purposes, it shall be presumed that the total wages reported by the taxpayer to this state for unemployment compensation purposes constitutes compensation paid in this state, except for compensation excluded under ARM 42.16.1216. The presumption may be overcome by satisfactory evidence that an employee's compensation is not properly reportable to this state for unemployment compensation purposes.

(2) Compensation is paid in this state if any one of the following tests are met:

(a) The employee's service is performed entirely within the state.

(b) The employee's service is performed both within and without the state, but the service performed without the state is incidental to the employee's service within the state. The word "incidental" means any service which is temporary or transitory in nature, or which is rendered in connection with an isolated transaction.

(c) If the employee's services are performed both within and without this state, the employee's compensation will be attributed to this state:

(i) if the employee's base of operations is in this state;

(ii) if there is no base of operations in any state in which some part of the service is performed, but the place from which the service is directed or controlled is in this state; or

(iii) if the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed but the employee's residence is in this state.

(3) The term "base of operations" is the place of more or less permanent nature from which the employee starts his work and to which he customarily returns in order to receive instructions from the taxpayer or communications from his customers or other persons, to replenish stock or other materials, repair equipment, or to perform any other function necessary to exercise his trade or profession at some other point or points. The term "place from which the service is directed or controlled" refers to the place from which the power to direct or control is exercised by the taxpayer.

AUTH: 15-30-305, MCA; IMP: 15-30-131 and 15-1-601, MCA.

RULE XIX SALES FACTOR IN GENERAL (1) Section 15-1-601, MCA, defines the term "sales" to mean all gross receipts of the taxpayer not allocated as nonbusiness income. Thus, for the purposes of the sales factor of the apportionment formula for each trade or business of the taxpayer, the term "sales" means all gross receipts derived by a taxpayer from transactions and activity in the regular course of such trade or business.

(2) The following are rules for determining "sales" in various situations:

(a) In the case of a taxpayer engaged in manufacturing and selling or purchasing and reselling goods or products, "sales" includes all gross receipts from the sales of such goods or products (or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the tax period) held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business. Gross receipts for this purpose means gross sales, less returns and allowances and includes all interest income, service charges, carrying charges, or time-price differential charges incidental to such sales. Federal and state excise taxes (including sales taxes) shall be included as part of such receipts if such taxes are passed on to the buyer or included as part of the selling price of the product.

(b) In the case of cost plus fixed fee contracts, such as the operation of a government-owned plant for a fee, "sales" includes the entire reimbursed cost, plus the fee.

(c) In the case of a taxpayer engaged in providing services, such as the operation of an advertising agency or the performance of equipment service contracts or research and development contracts, "sales" includes the gross receipts from the performance of such services including fees, commissions, and similar items.

(d) In the case of a taxpayer engaged in renting real or tangible property, "sales" includes the gross receipts from the rental, lease, or licensing the use of the property.

(e) In the case of a taxpayer engaged in the sale, assignment, or licensing of intangible personal property such as patents and copyrights, "sales" includes the gross receipts therefrom.

(f) If a taxpayer derives receipts from the sale of equipment used in its business, such receipts constitute "sales". For example, a truck express company owns a fleet of trucks and sells its trucks under a regular replacement program. The gross receipts from the sales of the trucks are included in the sales factor.

(3) In some cases, certain gross receipts should be disregarded in determining the sales factor in order that the apportionment formula will operate fairly to apportion to this state the income of the taxpayer's trade or business. See ARM 42.16.1229.

(4) "Gross premium receipts" are all receipts paid in by the subscribers to the various coverages offered by the company, and are assigned to the state of the domicile of the subscriber. In the case of a group policy, the assignment is to the state of the domicile of the employer-agent who collects and remits the premiums to the company.

AUTH: 15-30-305, MCA; IMP: 15-30-131 and 15-1-601, MCA.

RULE XX CONSISTENCY IN REPORTING WITH RESPECT TO SALES (1)

In filing returns with this state, if the taxpayer departs from or modifies the basis for excluding or including gross receipts in the sales factor used in returns for prior years, the

taxpayer shall disclose in the return for the current year the nature and extent of the modification.

(2) If the returns or reports filed by the taxpayer with all states to which the taxpayer reports under Article IV of the Multistate Tax Compact or the Uniform Division of Income for Tax Purposes Act are not uniform in the inclusion or exclusion of gross receipts, the taxpayer shall disclose in its return to this state the nature and extent of the variance.

AUTH: 15-30-305, MCA; IMP: 15-30-131 and 15-1-601, MCA.

RULE XXI DENOMINATOR OF SALES FACTOR (1) The denominator of the sales factor shall include the total gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business, except receipts excluded under ARM 42.16.1229.

AUTH: 15-30-305, MCA; IMP: 15-30-131 and 15-1-601, MCA.

RULE XXII NUMERATOR OF SALES FACTOR (1) The numerator of the sales factor shall include gross receipts attributable to this state and derived by the taxpayer from transactions and activity in the regular course of its trade or business. All interest income, service charges, carrying charges, or time-price differential charges incidental to such gross receipts shall be included regardless of the place where the accounting records are maintained or the location of the contract or other evidence of indebtedness.

AUTH: 15-30-305, MCA; IMP: 15-30-131 and 15-1-601, MCA.

RULE XXIII SALES OF TANGIBLE PERSONAL PROPERTY (1) Gross receipts from the sales of tangible personal property (except sales to the United States Government; see ARM 42.16.1225) are in this state:

(a) if the property is delivered or shipped to a purchaser within this state regardless of the f.o.b. point or other conditions of sale; or

(b) if the property is shipped from an office, store, warehouse, factory, or other place of storage in this state and the taxpayer is not taxable in the state of the purchaser.

(2) Property shall be deemed to be delivered or shipped to a purchaser within this state if the recipient is located in this state, even though the property is ordered from outside this state.

(3) Property is delivered or shipped to a purchaser within this state if the shipment terminates in this state, even though the property is subsequently transferred by the purchaser to another state.

(4) The term "purchaser within this state" shall include the ultimate recipient of the property if the taxpayer in this state, at the designation of the purchaser, delivers to or has the property shipped to the ultimate recipient within this state.

(5) When property being shipped by a seller from the state of origin to a consignee in another state is diverted while

enroute to a purchaser in this state, the sales are in this state.

AUTH: 15-30-305, MCA; IMP: 15-30-131 and 15-1-601, MCA.

RULE XXIV SALES OF TANGIBLE PERSONAL PROPERTY TO FEDERAL GOVERNMENT (1) Gross receipts from the sales of tangible personal property to the United States Government are in this state if the property is shipped from an office, store, warehouse, factory, or other place of storage in this state.

(2) For the purposes of this rule, only sales for which the United States Government makes direct payment to the seller pursuant to the terms of its contract constitute sales to the United States Government. Thus, as a general rule, sales by a subcontractor to the prime contractor, the party to the contract with the United States Government, do not constitute sales to the United States Government.

AUTH: 15-30-305, MCA; IMP: 15-30-131 and 15-1-601, MCA.

RULE XXV SALES OTHER THAN SALES OF TANGIBLE PERSONAL PROPERTY (1) Section 15-1-601, MCA, provides for the inclusion in the numerator of the sales factor of gross receipts from transactions other than sales of tangible personal property (including transactions with the United States Government). Under this section gross receipts are attributed to this state if the income producing activity which gave rise to the receipts is performed wholly within this state. Also, gross receipts are attributed to this state if, with respect to a particular item of income, the income producing activity is performed within and without this state but the greater proportion of the income producing activity is performed in this state, based on costs of performance.

(2) The term "income producing activity" applies to each separate item of income and means the transactions and activity directly engaged in by the taxpayer in the regular course of its trade or business for the ultimate purpose of obtaining gains or profit. Such activity does not include transactions and activities performed on behalf of a taxpayer, such as those conducted on its behalf, by an independent contractor. Accordingly, income producing activity includes but is not limited to the following:

(a) the rendering of personal services by employees or the utilization of tangible and intangible property by the taxpayer in performing a service;

(b) the sale, rental, leasing, licensing, or other use of real property;

(c) the rental, leasing, licensing, or other use of tangible personal property;

(d) the sale, licensing, or other use of intangible personal property.

(3) The mere holding of intangible personal property is not, of itself, an income producing activity.

(4) The term "costs of performance" means direct costs determined in a manner consistent with generally accepted

accounting principles and in accordance with accepted conditions or practices in the trade or business of the taxpayer.

(5) Receipts (other than from sales of tangible personal property) in respect to a particular income producing activity are in this state if:

(a) the income producing activity is performed wholly within this state; or

(b) the income producing activity is performed both in and outside this state and a greater proportion of the income producing activity is performed in this state than in any other state, based on costs of performance.

(6) The following are special rules for determining when receipts from the income producing activities described below are in this state:

(a) Gross receipts from the sale, lease, rental or licensing of real property are in this state if the real property is located in this state.

(b) Gross receipts from the rental, lease, or licensing of tangible personal property are in this state if the property is located in this state. The rental, lease, licensing, or other use of tangible personal property in this state is a separate income producing activity from the rental, lease, licensing, or other use of the same property while located in another state. Consequently, if the property is within and without this state during the rental, lease, or licensing period, gross receipts attributable to this state shall be measured by the ratio which the time the property was physically present or was used in this state bears to the total time or use of the property everywhere during such period.

(c) Gross receipts for the performance of personal services are attributable to this state to the extent such services are performed in this state. If services relating to a single item of income are performed partly within and partly without this state, the gross receipts for the performance of such services shall be attributable to this state only if a greater portion of the services were performed in this state, based on costs of performance. Usually, where services are performed partly within and partly without this state, the services performed in each state will constitute a separate income producing activity. In such case the gross receipts for the performance of services attributable to this state shall be measured by the ratio which the time spent in performing such services in this state bears to the total time spent in performing such services everywhere. Time spent in performing services includes the amount of time expended in the performance of a contract or other obligation which gives rise to such gross receipts. Personal service not directly connected with the performance of the contract or other obligation, as for example, time expended in negotiating the contract, is excluded from the computations.

AUTH: 15-30-305, MCA; IMP: 15-30-131 and 15-1-601, MCA.

RULE XXVI SPECIAL APPORTIONMENT AND ALLOCATION COMPUTATIONS

(1) Section 15-1-601(18), MCA, provides that if the allocation and apportionment provisions do not fairly represent the extent

of the taxpayer's business activity in this state, the taxpayer may petition for or the department may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

- (a) separate accounting;
- (b) the exclusion of any one or more of the factors;
- (c) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or
- (d) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

(2) Section 15-1-601(18), MCA, permits a departure from the allocation and apportionment provisions of 15-1-601, MCA, only in limited and specific cases. Section 15-1-601(18), MCA, may be invoked only in specific cases where unusual fact situations (which ordinarily will be unique and nonrecurring) produce incongruous results under the apportionment and allocation provisions.

(3) In the case of certain types of business such as air transportation, rail transportation, ship transportation, trucking, television, radio, motion pictures, various types of professional athletics, and so forth, the foregoing rules in respect to the apportionment formula do not set forth appropriate procedures for determining the apportionment factors. Nothing in 15-1-601, MCA, or in ARM 42.16.1226 through 42.16.1229 shall preclude the department from establishing appropriate procedures under 15-1-601, MCA, for determining the apportionment factors for each such type of business, but such procedures shall be applied uniformly.

AUTH: 15-30-305, MCA; IMP: 15-30-131 and 15-1-601, MCA.

RULE XXVII SPECIAL COMPUTATIONS RELATED TO PROPERTY FACTOR

(1) The following special rules are established in respect to the property factor of the apportionment formula:

(a) If the subrents taken into account in determining the net annual rental rate under ARM 42.16.1214 produce a negative or clearly inaccurate value for any item of property, another method which will properly reflect the value of rented property may be required by the department or requested by the taxpayer.

(b) In no case, however, shall such value be less than an amount which bears the same ratio to the annual rental rate paid by the taxpayer for such property as the fair market value of that portion of the property used by the taxpayer bears to the total market value of the rented property.

(2) If property owned by others is used by the taxpayer at no charge or rented by the taxpayer for a nominal rate, the net annual rental rate for such property shall be determined on the basis of a reasonable market rental rate for such property.

AUTH: 15-30-305, MCA; IMP: 15-30-131 and 15-1-601, MCA.

RULE XXVIII SPECIAL COMPUTATIONS RELATED TO SALES FACTOR

(1) The following special rules are established in respect to the sales factor of the apportionment formula:

(a) Where substantial amounts of gross receipts arise from an incidental or occasional sale of a fixed asset used in the regular course of the taxpayer's trade or business, such gross receipts shall be excluded from the sales factor. For example, gross receipts from the sale of a factory or plant will be excluded.

(b) Insubstantial amounts of gross receipts arising from incidental or occasional transactions or activities may be excluded from the sales factor unless such exclusion would materially affect the amount of income apportioned to this state. For example, the taxpayer ordinarily may include or exclude from the sales factor gross receipts from such transactions as the sale of office furniture, business automobiles, etc.

(c) Where the income producing activity in respect to business income from intangible personal property can be readily identified, such income is included in the denominator of the sales factor and, if the income producing activity occurs in this state, in the numerator of the sales factor as well. For example, usually the income producing activity can be readily identified in respect to interest income received on deferred payments on sales of tangible property (ARM 42.16.1220) and income from sale, licensing, or other use of intangible personal property (ARM 42.16.1226).

(2) Where business income from intangible property cannot readily be attributed to any particular income producing activity of the taxpayer, such income cannot be assigned to the numerator of the sales factor for any state and shall be excluded from the denominator of the sales factor. For example, where business income in the form of dividends received on stock, royalties received on patents or copyrights, or interest received on bonds, debentures, or government securities results from the mere holding of the intangible personal property by the taxpayer, such dividends and interest shall be excluded from the denominator of the sales factor.

AUTH: 15-30-305, MCA; IMP: 15-30-131 and 15-1-601, MCA.

RULE XXIX SPECIAL COMPUTATIONS RELATED TO FREIGHT AND PASSENGER CARRIERS (1) A portion of the net income of taxpayers engaged in the transportation of freight or passengers within and without Montana may be attributed to the movement of revenue-producing equipment, drivers, train crews, or other operating personnel across the state.

(2) The percentage of miles traveled within Montana to total miles traveled everywhere shall be the percentage used in determining the amount of income attributable to this state. The apportionment formula for such transportation activities shall be computed as follows:

(a) Fixed properties, such as buildings and land used in the business, terminal facilities, shop equipment, and cars and trucks used in gathering or delivering local freight, shall be assigned to the state in which such properties are located. The value of equipment used in interstate transportation shall be assigned to this state on the mileage basis.

(b) The wages and salaries of employees assigned to fixed locations as officers or clerical, administrative, pick-up and delivery, or terminal personnel within this state shall be included in the Montana payroll factor. The wages of personnel operating transportation equipment within and without this state shall be assigned to this state upon the basis of miles. The wages of such personnel shall be assigned to Montana in proportion that miles traveled within this state bear to the total miles traveled everywhere.

(c) Revenues will be assigned to this state in the proportion that the miles traveled within the state bear to the total miles traveled everywhere. All other revenue shall be assigned in accordance with the provisions of 15-1-601, MCA, and ARM 42.16.1220 through 42.16.1222, and 42.16.1226.

AUTH: 15-30-305, MCA; IMP: 15-30-131 and 15-1-601, MCA.

4. The Department is proposing these amendments and new rules in order to provide more detailed information for proper preparation of Montana individual income tax returns on behalf of nonresident individuals involved in businesses located both in Montana and out of Montana. Specific comments on individual rules follow:

42.16.1115 is changed to delete reference to Rule 42.16.1116 and to add reference to New Rules I through XXIX. No reference was provided under the original rule for more detailed procedures and exceptions.

42.16.1116 is deleted because the information is provided for under New Rules I through XXIX.

42.16.1117 is changed to add references to New Rules I through XXIX. No reference was provided under the original rule for more detailed procedures and exceptions.

RULE I This rule establishes the intent of these new regulations. "Intended to set forth rules concerning the application of the apportionment and allocation provisions of Title 15, chapter 3, part 1, MCA and Article IV of 15-1-601, MCA."

RULE II provides definitions for "allocation, apportionment, business activity and taxpayer" in connection with remaining new rules.

RULE III provides that if a taxpayer is involved in more than one trade or business, each is allocated and apportioned separately. It also provides the regulation for determining whether or not the taxpayer is involved in a single trade or business.

RULE IV defines business and nonbusiness income.

RULE V provides rules for determining business and nonbusiness income in order to arrive at income apportioned to Montana.

RULE VI provides rules for determining when income from a business activity is subject to taxable jurisdiction in another state.

RULE VII apportionment formula provides for a three-factor formula and refers to other new rules to reflect each of the elements.

RULE VIII defines the property factor of the apportionment formula and defines which property is business and which is nonbusiness.

RULE IX provides that only business property may be used in calculating the property factor of the formula.

RULE X provides that if a taxpayer changes the manner of valuing property, the change should be so stated in the return.

RULE XI states which property shall be included in the numerator of the property factor.

RULE XII gives the rules for establishing valuation of owned property for the property factor.

RULE XIII provides rules for establishing the value of rented property for inclusion in the property factor.

RULE XIV allows for monthly averaging of property where substantial fluctuations have occurred and the annual averaging method would not be appropriate.

RULE XV defines the payroll factor in general and gives definition of terms used in other rules on the payroll factor.

RULE XVI provides that when a taxpayer changes his or her method of reporting compensation for payroll factor purposes, he or she shall clarify this change on his/her return.

RULE XVII states which payroll is to be included in the denominator of the payroll factor.

RULE XVIII states which payroll is to be included in the numerator of the payroll factor.

RULE XIX defines which sales are to be included in the sales factor in various situations.

RULE XX provides that when a taxpayer changes his or her method of reporting sales, he or she shall clarify this change on his/her return.

RULE XXI states which sales are to be included in the denominator of the sales factor.

RULE XXII states which sales are to be included in the numerator of the sales factor.

RULE XXIII clarifies when sales of tangible personal property are to be included in the sales factor.

RULE XXIV gives the circumstances under which sales to the Federal Government are to be designated as sales within Montana.

RULE XXV provides for the circumstances under which sales other than sales from tangible personal property are to be included as Montana sales.

RULE XXVI provides for special circumstances when the normal three-factor formula does not adequately reflect the taxpayer's extent of business in Montana.

RULE XXVII provides special rules when the taxpayer is involved in a subrent situation for calculating the property factor.

RULE XXVIII provides for exceptions to the sales factor when special sales are not to be included as part of the apportionment factor.

RULE XXIX provides special calculations when individuals are involved in a business engaged as freight or passenger carriers.

5. Interested persons may present their data, views or arguments, either orally or in writing at the hearing. Written data, views or arguments may also be submitted to Ann E. Kenny, Legal Division, Department of Revenue, Helena, Montana 59620, no later than November 12, 1982.

6. David Slovak, Agency Legal Services, Department of Justice, has been designated to preside over and conduct the hearing.

7. The authority of the Department to make the proposed rules is based on Section 15-30-305, MCA, and the rules implement Sections 15-30-131 and 15-1-601, MCA.



ELLEN FEAVER, Director
Department of Revenue

Certified to the Secretary of State: October 4, 1982

BEFORE THE DEPARTMENT OF SOCIAL
AND REHABILITATION SERVICES OF THE
STATE OF MONTANA

In the matter of the adoption	)	NOTICE OF ADOPTION OF AN
of an amendment to a federal	)	AMENDMENT TO A FEDERAL
agency rule pertaining to the	)	AGENCY RULE INCORPORATED BY
food stamp program, Rule	)	REFERENCE IN RULE 46.11.101,
46.11.101	)	FOOD STAMP PROGRAM. NO
	)	PUBLIC HEARING CONTEMPLATED


TO: All Interested Persons

1. The Department of Social and Rehabilitation Services hereby gives notice to the adoption and incorporation by reference of later amendments to 7 CFR 272, 273, and 274 published in 47 Fed. Reg. 35166, Friday, August 13, 1982. 7 CFR 272, 273, and 274 are presently incorporated by reference in Rule 46.11.101, Food Stamp Program. These amendments provide for final rules which eliminate the 60-day continued eligibility for households that move, require that the food stamp application inform applicants of verification requirements and penalties, change nutrition education requirements, set minimum mandatory court sentences for criminal offenses, disallow deductions for expenses paid with vendor payments and allow an income exclusion of work-related child care adjustments issued under Title IV-A of the Social Security Act, and eliminate requirements to establish nationwide staffing standards. A copy of 7 CFR 272, 273, and 274 published in 47 Fed. Reg. 35166, Friday, August 13, 1982, may be obtained from the Department of Social and Rehabilitation Services, Economic Assistance Division, Box 4210, 111 Sanders, Helena, Montana 59604.

2. The effective date for the adoption of the later amendment is October 15, 1982. This exception from the standard effective date of 30 days following publication is taken in order to comply with federal law requiring implementation of this amendment September 13, 1982.

3. If the department receives requests for a public hearing under 2-4-315, MCA, on the proposed amendment from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed amendment; from the Administrative Code Committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 5,253 persons based on 52,530 food stamp recipients.

4. The authority of the department to amend the rule is based on Section 53-2-201, MCA and the rule implements 53-2-306, MCA.



Director, Social and Rehabilitation Services

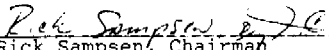
Certified to the Secretary of State October 1, 1982.

BEFORE THE WHEAT RESEARCH & MARKETING COMMITTEE
OF THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the adoption)	NOTICE OF ADOPTION OF
of new rules replacing)	NEW RULES REPLACING
existing rules implementing)	EXISTING RULES IMPLEMENTING
Sec. 80-11-222, MCA (Food)	SEC. 80-11-222, MCA (FOOD
and Fuels Program).)	AND FUELS) PROGRAM
	4.9.513 through 4.9.524

TO: All Interested Persons:

1. On April 15, 1982, at p. 627 of the 1982 MAR, Issue #7, the Wheat Research & Marketing Committee, Department of Agriculture published notice of the adoption of the rules in the above entitled matter.
2. No comments, testimony, or requests for hearing were received, and the rules are adopted as proposed.
3. The authority of the Department to make the proposed adoption is based on Sec. 80-11-205 MCA.


Rick Sampsen, Chairman
by Jim Christianson, Executive Secretary
Wheat Research & Marketing Committee

In the matter of the) NOTICE OF REPEAL OF ARM
repeal of rules 4.10.301) 4.10.301 through 4.10.310
through 4.10.310 Aquatic)
Herbicides)

1. On August 26, 1982, at p. 1566A of the 1982 MAR, Issue #16, the Department of Agriculture published notice of the proposed repeal of the rules in the above entitled matter.
2. No comments, testimony, or requests for hearing were received, and the rules are repealed as proposed.
3. The authority of the Department to make the proposed repeal is based on Section 80-8-105 MCA.

W. Gordon McComber
W. Gordon McComber, Director
Montana Department of Agriculture

Certified to the Secretary of State October 4, 1982

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF NURSING

In the matter of the amendment) NOTICE OF AMENDMENT OF ARM
of ARM 8.32.408 concerning tem-) 8.32.408 TEMPORARY WORK PERMITS
porary work permits)

TO: All Interested Persons:

1. On August 26, 1982, the Board of Nursing published a notice of amendment of 8.32.408 concerning temporary work permits and proposed adoption of new rules under sub-chapter 3 concerning specialty areas of nursing at pages 1582 through 1585, 1982 Montana Administrative Register, issue number 16.

2. The board has amended 8.32.408 exactly as proposed. The proposed adoption of new rules are being noticed for hearing in the notice section of this register. The board received the required number of requests for public hearing on the new rules. No request for hearing was made on the amendment of 8.32.408.

3. No comments or testimony were received.

BOARD OF NURSING
JANIE CROMWELL, R.N., PRESIDENT

BY:


GARY BUCHANAN, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, October 4, 1982.

BEFORE THE DEPARTMENT OF STATE LANDS
AND THE BOARD OF LAND COMMISSIONERS OF
THE STATE OF MONTANA

In the matter of the amendment) NOTICE OF ADOPTION OF
of rules 26.3.108 and 26.3.121) AMENDMENT OF RULES
relating to renewals of surface) 26.3.108 AND 26.3.121
leases and preference rights)

TO: All interested Parties

1. On July 15, 1982, the Department of State Lands published notice of proposed amendment of rules relating to renewals of surface leases and preference rights at page 1379 through 1383 of the 1982 Montana Administrative Register, issue no. 13.

2. The Board of Land Commissioners has amended the Rules as proposed with the following amendments:

26.3.108 RENEWAL OF LEASE - PREFERENCE RIGHT

(1) - (4) Same as proposed amendments.

(5) A surface lessee who has lost the opportunity to exercise a preference right because of a sublease or other arrangement, may apply to the commissioner and set forth the specific factual and legal grounds which the lessee contends entitles that party to a hearing. Upon filing such application, the commissioner may, at his sole discretion and within twenty days, if the grounds include a bona fide factual dispute, the commissioner shall order a hearing within twenty days. the failure to order said hearing within such period acts automatically as denial of an application for a hearing. The commissioner may, in the exercise of his discretion, grant the application and order a hearing, if in his opinion, the factual and legal grounds raised by the lessee raise one or more issues, the resolution of which are important to the department of state lands and the leasing of state lands and to other lessees confronted with similar issues or circumstances. In the event a hearing is granted, when such a hearing is granted the contested case provision of the Montana administrative procedure act shall apply. The board shall make a final decision after considering the entire record or may delegate such authority to the commissioner. The commissioner shall appoint a hearings examiner to conduct the hearing and produce proposed findings of fact, proposed conclusions of law and a proposed order. The hearings examiner may be from the department's staff or from another source.

IN THE EVENT A SURFACE LESSEE HAS LOST THE OPPORTUNITY TO EXERCISE A PREFERENCE RIGHT BECAUSE OF A SUBLEASE OR OTHER ARRANGEMENT, AND DISPUTES ONLY THE LEGAL GROUNDS UPON WHICH THE RIGHTS WERE LOST, THEN THE LESSEE MAY APPLY TO THE COMMISSIONER FOR A DECLARATORY JUDGMENT CONCERNING SUCH LEGAL GROUNDS. THE APPLICATION SHALL SPECIFY THE LEGAL GROUNDS WHICH THE LESSEE DISPUTES. THE PROCEDURE OF APPLYING FOR AND

ISSUING SUCH A DECLARATORY JUDGMENT SHALL BE THAT SET FORTH IN
THE MONTANA ADMINISTRATIVE PROCEDURE ACT.

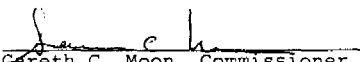
(6) - (8) Same as proposed amendments.

3. Comments were received from the Legislative Council. A summary of their comment follows:

(a) A preference right is a property right, therefore, the department must allow a hearing to a lessee who requests one when a preference right is lost. The opportunity for such a hearing cannot be at the discretion of the commissioner, but must be accorded as a right.

The department carefully considered the above comment. The following is the department's response to the comment:

(a) The department believes that a lessee who has lost the opportunity to exercise a preference right because of a sublease or other arrangement and disputes the factual grounds of such lost opportunity must be accorded a hearing when one is requested. When the lessee disputes the legal grounds of the lost opportunity the declaratory judgment procedure will adequately protect the lessee's rights. The amendment to the amendments reflects the Legislative Council's comment and the department's response.


Gareth C. Moon, Commissioner
Department of State Lands

Certified to the Secretary of State September 30, 1982.

VOLUME NO. 39

OPINION NO. 73

INITIATIVE AND REFERENDUM - Application to the creation of a Special Improvement District;
SPECIAL IMPROVEMENT DISTRICTS - Repeal by referendum;
MONTANA CODE ANNOTATED - Sections 7-5-131, 7-5-132, 7-5-134, 7-5-137, 7-12-4102, 7-12-4110;
MONTANA CONSTITUTION - Article III, sections 4-5, article V, section 1, article XI, section 8.

HELD: A resolution creating a special improvement district under section 7-12-4102, MCA, is not subject to repeal by referendum.

28 September 1982

Joseph R. Hunt, Esq.
Acting City Attorney
Aronow, Anderson, Beatty & Lee
Drawer D
153 Main Street
Shelby, Montana 59474

Dear Mr. Hunt:

You have requested my opinion on the following questions concerning the application of the initiative and referendum powers to a city's creation of a special improvement district:

1. Is a resolution creating a special improvement district under section 7-12-4102, MCA, subject to repeal by referendum?
2. Does the filing of a sample petition requesting a referendum on a resolution creating a special improvement district delay the effective date of the resolution?
3. If a resolution creating a special improvement district is subject to repeal by referendum, what is the effect of the resolution's repeal if the city has already ordered the proposed improvement?

You have indicated that on July 6, 1982, the Shelby City Council adopted a resolution creating a special improvement

district for the purpose of installing a storm-sewer drainage system. The state laws relating to the creation of special improvement districts provide that if more than 50% of the owners of the property to be assessed for the improvements protest such improvements, further proceedings shall be halted. § 7-12-4110, MCA. In this case, the protest by affected property owners was not successful.

The questions you have posed arose when, soon after the protest was found to be insufficient, a petition was filed with the Clerk and Recorder of Toole County calling for a referendum on the resolution creating the special improvement district.

The powers of initiative and referendum are reserved to the people in the 1972 Montana Constitution, article III, sections 4-5, article V, section 1, and article XI, section 8. Pursuant to these provisions in the state constitution, the Legislature enacted sections 7-5-131 through 7-5-137, MCA. These sections set forth the procedures by which electors of each local government may exercise the powers of initiative and referendum. Section 7-5-131, MCA, provides, in part, that prior resolutions and ordinances may be repealed in the manner provided in sections 7-5-132 through 7-5-137, MCA. Briefly stated, sections 7-5-132 through 7-5-137, MCA, call for the filing of a petition for referendum signed by 15% of the registered electors of the local government (§ 7-5-132(3)(d)), which petition, if submitted prior to the effective date of the ordinance in question, shall delay the ordinance's effective date until ratification by the electors (§ 7-5-132(1)). Before a petition is circulated for signatures, however, a sample petition must be submitted to the county election administrator for approval as to form and for referral to the local government attorney, who, in turn, must prepare a statement of purpose and a statement of the implication of a vote for or against the ballot issue (§ 7-5-134(2-4)).

The first question presented is whether the general power of referendum provided in the state constitution and enacted in sections 7-5-131 through 7-5-137, MCA, applies to a resolution creating a special improvement district. I have concluded that it does not apply and I therefore need not reach your second and third questions.

Recent Montana Supreme Court decisions have held that the initiative and referendum procedures apply to legislative actions but not to acts that are administrative in

character. City of Billings v. Nore, 148 Mont. 96, 417 P.2d 458 (1966); Chouteau County v. Grossman, 172 Mont. 373, 563 P.2d 1125 (1977); Dieruf v. City of Bozeman, 173 Mont. 447, 568 P.2d 127 (1977). While it is difficult to differentiate between legislative and administrative acts, the court in Dieruf determined that an ordinance and resolution passed by the city commission of Bozeman relative to the creation of a special improvement district were not subject to either referendum or initiative procedures. The court went on to cite a long line of decisions of other courts in support of its holding. 173 Mont. at 451-52. Montana case law on this point goes back to the early part of the century when the Montana Supreme Court held in Allen v. City of Butte, 55 Mont. 205 at 208, 175 P. 595 at 596 (1918), quoting Carlson v. City of Helena, 39 Mont. 82, 102 P. 39 (1909), that:

The initiative and referendum apply only to matters of general legislation, in which all the qualified electors of the city are interested, and not to matters of purely local concern, such as the creation of a special improvement district, in which only the inhabitants or property owners are interested. (Emphasis added.)

This holding was affirmed in Boyle v. City of Butte, 55 Mont. 209, 175 P. 596 (1918), and distinguished in Grossman, 172 Mont. at 379. In that case, the court noted the difference between a case involving use of general county funds and a case such as Allen where a special assessment was involved.

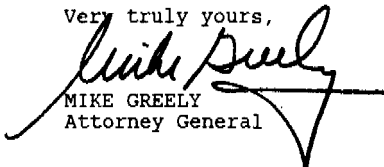
In reaching the conclusion that a resolution creating a special improvement district is not subject to a referendum, I have kept in mind the principle that, as a general rule, all matters in which the voters have an interest are subject to the referendum and that statutes in aid of these reserved powers should be liberally construed. See Grossman, 172 Mont. at 378, and State ex rel. Haynes v. District Court, 106 Mont. 470 at 484, 78 P.2d 937 at 945 (1938). However, in addition to support for my conclusion in the Montana case law, the fact that there is a specific provision in the law that enables the affected member of the public to protest the creation of special improvement districts is also persuasive. Under sections 7-12-4110 and 72-12-4113, MCA, if written protest against a proposal for a special improvement district is made by the owners of more than 50% of the area of the property to be assessed for

improvements, no further action is to be taken on the proposal. Thus, citizens affected by the county commission's action in this matter do have means by which they may register their opposition.

THEREFORE, IT IS MY OPINION:

A resolution creating a special improvement district under section 7-12-4102, MCA, is not subject to repeal by referendum.

Very truly yours,



MIKE GREELY
Attorney General

NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

The Administrative Code Committee reviews all proposals for adoption of new rules or amendment or repeal of existing rules filed with the Secretary of State. Proposals of the Department of Revenue are reviewed only in regard to the procedural requirements of the Montana Administrative Procedure Act. The Committee has the authority to make recommendations to an agency regarding the adoption, amendment or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. In addition, the Committee may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a Joint Resolution directing an agency to adopt, amend or repeal a rule.

The Committee welcomes comments from the public and invites members of the public to appear before it or to send it written statements in order to bring to the Committee's attention any difficulties with existing or proposed rules. The address is Room 128, Montana State Capitol, Helena, Montana 59620.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA
AND THE MONTANA ADMINISTRATIVE REGISTER

Definition: Administrative Rules of Montana (ARM) is a loose-leaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

Montana Administrative Register (MAR) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statute and rules by the attorney general (Attorney General's Opinions) and agencies' (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

- | | |
|-------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------|
| Known Subject Matter | 1. Consult General Index, Montana Code Annotated to determine department or board associated with subject matter or statute number. |
| Department | 2. Refer to Chapter Table of Contents, Title 1 through 46, page i, Volume 1, ARM, to determine title number of department's or board's rules. |
| | 3. Locate volume and title. |
| Subject Matter and Title | 4. Refer to topical index, end of title, to locate rule number and catchphrase. |
| Title Number and Department | 5. Refer to table of contents, page 1 of title. Locate page number of chapter. |
| Title Number and Chapter | 6. Go to table of contents of Chapter, locate rule number by reading catchphrase (short phrase describing rule.) |
| Statute Number and Department | 7. Go to cross reference table at end of each title which lists each MCA section number and corresponding rules. |
| Rule in ARM | 8. Go to rule. Update by checking the accumulative table and the table of contents for the last register issued. |

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Procedure Act for inclusion in the ARM. The ARM is updated through June 30, 1982. This table includes those rules adopted during the period July 1, 1982 through September 30, 1982, and any proposed rule action that is pending during the past 6 month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through June 30, 1982, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 1982 Montana Administrative Registers.

ADMINISTRATION, Department of, Title 2

- I-IX Leave of Absence Without Pay, p. 1622
(Teachers' Retirement Board)
- I Creditable Service for Private School Employment, p. 1565
- 2.21.135 and other rules - Sick Leave, p. 1635
- 2.21.216 and other rules - Annual Vacation Leave, p. 1625
- 2.21.301 and other rules - Disaster and Emergency Leave, p. 1619
- 2.23.304 and other rules - Operation of Montana Merit System, p. 1137A, 1539
- 2.21.401 and other rules - Military Leave, p. 1632
(Workers' Compensation Court)
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